99-796

Docket No. ~~99-585~~

Supreme Court, U.S.
FILED
DEC 7 1999
OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES

LOCKHEED MARTIN IMS CORPORATION and EDWARD AVILA,

Cross-Petitioners,

v.

RONALD BRANSON,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

RONALD BRANSON
Cross-Respondent, Pro Se
16623 Calahan St.
North Hills CA 91343
(818) 875-4231

December 6, 1999

CROSS-RESPONDENT'S OPPOSITION TO CONDITIONAL CROSS-PETITION

Statement of the Case

The question of attorney's fees, costs, or other sanctions cannot be reached until the threshold question of whether the judgment is supported by the record (presented as Question 2 in the Petition) is decided. Everything stated in the Cross-Petition is moot pending a determination and showing that the judgment is valid and supported by evidence in the record. Cross-petitioners did not address that question in their respondents' brief.

Argument

The question specifically is whether respondents/ cross-petitioners Lockheed and Avila may recover attorney's fees under 42 USC §1988, upon a finding that petitioner's/cross-respondent's (plaintiff) action under 42 USC §1983 was frivolous, even though the action was dismissed for lack of subject matter jurisdiction.

The two premises in that question are: (1) upon a finding that the action was frivolous; and (2) the action was dismissed for lack of subject matter jurisdiction.

1. ***A finding that the action was frivolous.***

This argument is presented under Argument 3-C at pages 10-12 of the Petition. The district court, on the issue of "frivolous action", stated merely: "It is further Ordered, *sua sponte,* that Plaintiff be

sanctioned in the amount of $1,000.00 for filing this frivolous action...." **[Petn. A-7]**. No evidence is shown supporting such "finding." See pages 11-12 of the Petition herein. If the basis for the sanction is Rule 11 FRCiv.P, as the court of appeals indicates, please note that the court's responsibilities under that Rule were not followed. **[Petn. pp 11-12]**.

On the "frivolous action" issue, the court of appeals stated:

> "[B]ecause the record indicates that Branson's action was a frivolous and impermissible collateral attack against a prior state court judgment, the district court properly imposed sanctions sua sponte against Branson. See Fed.R. Civ.P. 11. **[Petn pp 10-11; Petn A-3]**

However, the court of appeals failed to show where "the record indicates that [the] action was a frivolous and impermissible collateral attack against a prior state court judgment..." This issue is raised in the petition as Question 2 "Whether the judgment is supported by the record." Cross-petitioners Lockheed and Avila did not respond to that question in their respondents' brief. Petitioner stands on his statement on page 11 of the petition, to wit:

> As shown in Argument 2..., it is impossible for petitioner to have attacked a prior state court judgment according to the evidence on record in this case.

2. ***The action was dismissed for lack of subject matter jurisdiction.***

As shown above, the court of appeals attributes that dismissal to its unsupported contention, to wit:

> [B]ecause the record indicates that Branson's action was a frivolous and impermissible collateral attack against a prior state court judgment.... **[Petn A-3]**

This entire case rests upon that contention by the court of appeals, and unless and until citation of evidence from the record is made, showing that the record *does indeed support* that contention, and the court's judgment of June 17, 1999 generally **[Petn A-1 thru A-4]**, the question of attorney's fees cannot be reached.

As cross-respondent stated in the petition:

> As this case stands right now, sanctions [*including attorney's fees -RB*] and costs against petitioner are not justified under law; a currently pending post-judgment motion for Rule 38 FRAP sanctions may shed future light on this issue. Petitioner reserves his right to file a supplemental brief... upon receiving a decision on that motion. **[Petn pp 12-13]**

A decision has been received on the Rule 38 motion wherein the court of appeals has awarded attorney's fees and double costs against petitioner, *still refusing* to cite evidence from the record in support of its judgment upon which these sanctions rely. The court once again refused mandatory

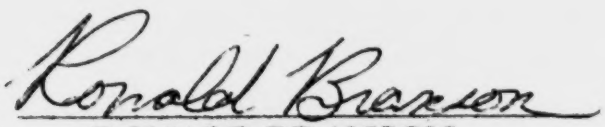
judicial notice of the evidence supplied by petitioner necessary to cite the portion(s) of the record in support of the judgment.

A supplemental brief is forthcoming.

Conclusion

Cross-respondent specifically seeks a determination and showing by evidence from the record that the judgment of June 17, 1999, is a valid judgment.

Dated: December 6, 1999



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